Filed 12/10/08 Ayres v. Mountain High Holdings CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ASHLEY AYRES, Plaintiff and Appellant, v. MOUNTAIN HIGH HOLDINGS, LLC, Defendant and Respondent.	B201469 (Los Angeles County Super. Ct. No. MC017296)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Arkin & Glovsky, Sharon J. Arkin and Scott C. Glovsky; DiMarco, Araujo & Montevideo and B. James Pantone for Plaintiff and Appellant.

Lauria Tokunaga Gates & Linn, Mark D. Tokunaga and Cameron D. Bordner for Defendant and Respondent.

Plaintiff Ashley Ayres appeals from a judgment entered after the court granted summary judgment. Ayres, who was injured while snowboarding at Mountain High Resort (Mountain High), sued Mountain High Holdings, LLC (the owner and operator of Mountain High) for her injuries. In granting summary judgment in favor of Mountain High Holdings, the court found Ayres's claims were precluded under the primary assumption of the risk doctrine. In part, Ayres contends the primary assumption of risk doctrine does not apply. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2005, Ayres and four friends went to Mountain High in Wrightwood, California to enjoy a day of snowboarding. Ayres was an intermediate level snowboarder and the second best snowboarder in the group that day. Matt Paulsen, one of Ayres's friends, was an advanced level snowboarder and the most experienced snowboarder in the group. The group of friends snowboarded down several runs that day.

Up until the time of the accident, all of the runs that the friends snowboarded were either beginner or intermediate slopes. The temperature at Mountain High that day was above freezing; however, there were several areas with patches of ice at the resort. Paulsen noted that when going down an intermediate slope named Goldrush, he hit some ice and slid approximately 100 yards down the slope.

At some point in the day, the group decided to try a few new runs. Paulsen intended to snowboard down Olympic Bowl, a double black diamond-experts only run. Although Ayres alleged in her complaint that she had intended to snowboard down Olympic Bowl, Chris Shynn, one of the skiers in Ayres's group, later asserted that Ayres did not intend to go down the double black diamond slope. The rest of the group had planned on going down Route 66, an intermediate run.

Although unsure of their exact location, the group stopped on a level area somewhere above the Olympic Bowl run. Shynn noted that he saw orange tape across a sign that marked the beginning of the Route 66 run indicating that it was closed. Meanwhile, Paulsen noticed that there was a little more than 100 yards of ice on the Olympic Bowl run. Nevertheless, Paulsen chose to snowboard down Olympic Bowl. While beginning his decent down Olympic Bowl, Paulsen was able to get an edge on the slope and stop to tell the remaining members of the group not to go down Olympic Bowl because it was too icy and steep for them. Immediately thereafter, Paulsen successfully completed snowboarding down Olympic Bowl.

Soon after Paulsen snowboarded down Olympic Bowl, Ayres took off her snowboard, took a few steps, slipped on the ice and slid down Olympic Bowl run sustaining severe injuries. Shynn, another intermediate snowboarder, reacted to her accident by picking up Ayres's snowboard and attempting to snowboard down the double black diamond run. As an intermediate snowboarder, Shynn was unable to navigate the slope, slipped and slid down the run, but was fortunate in sustaining no injuries.

Mountain High Holdings moved for summary judgment on two grounds -- the primary assumption of the risk doctrine and a purported release preprinted on Ayres's lift ticket. The court granted summary judgment in favor of Mountain High Holdings on the basis the assumption of the risk doctrine barred Ayres's claims.

Ayres timely appealed from the judgment entered after the court granted summary judgment.

DISCUSSION

I. Standard of Review

On appeal, the trial court's determination on a summary judgment motion is subject to de novo review. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) The purpose of the law of summary judgment has been well defined. It is "to provide courts with a mechanism to cut through the parties' pleadings in order to

determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Such a motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

A moving defendant has met his burden if one or more elements of the cause of action has not been established or if there is a complete defense. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) In evaluating all the papers, the court views all the evidence in the light most favorable to the nonmoving party. (*Ibid*.) Additionally, any doubts as to the whether the motion for summary judgment should be granted should be decided in favor of the opposing party. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1259.)

II. Primary Assumption of The Risk

Appellant contends the primary assumption of the risk doctrine does not apply in this case either because there was no evidence the particular risk (a huge field of ice) was an inherent risk of snowboarding or because Mountain High acted recklessly and/or increased the risk. Whether the primary assumption of risk doctrine applies is a question of law. (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1219.)

In *Knight v. Jewett* (1992) 3 Cal.4th 296, 314-315, the California Supreme Court first set out the doctrine of primary assumption of the risk. Since that time, the duties owed by proprietors and operators of sports venues to sports participants have been clearly defined. (*Ford v. Polaris Industries, Inc.* (2006) 139 Cal.App.4th 755, 774.) The owners or operators of a sports facility owe a duty to sports participants not to increase the inherent risks in the sport. (*Ibid*.) In determining what are the inherent risks of skiing or snowboarding, we look to the *Freeman v. Hale* (1994) 30 Cal.App.4th 1388 test which states: "'[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the

prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.'" (*Distefano v. Forester*, *supra*, 85 Cal.App.4th at p. 1261.)

Appellant argues that encountering a large field of ice is not an inherent risk of skiing. Although the courts of this state have repeatedly asserted that ice is an inherent risk of skiing, no case has defined how much ice is an inherent risk of skiing. Although *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358 did not directly address this point, its facts are instructive. In that case, the plaintiff went to a ski resort and enrolled in ski lessons to learn how to ski. (*Id*., at p. 1363.) The ski instructor challenged the beginning skier by taking him to a more challenging mountain. (*Ibid*.) The ski run was icy and plaintiff fell many times. Indeed, the ski instructor remarked "that portion of the mountain was frequently icy, and that many people jokingly referred to the icy conditions as 'Summit Cement.'" (*Id*., at p. 1364.) In *Allan*, the court decided the case exclusively on the release that the plaintiff had signed and did not consider the plaintiff's other arguments. (*Id*., at pp. 1364-1365.) However, it is important to note that conditions such as an icy run are not new or novel occurrences at ski resorts. (See also *Kane v. National Ski Patrol System, Inc.* (2001) 88 Cal.App.4th 204, 208, 214 [discussing an accident that occurred when skiing down an icy slope and concluding assumption of the risk barred the action].)

The courts of this state have long held that ice is an inherent risk in skiing along with other conditions such as moguls, bare spots, rocks, trees, other natural growth or debris and ski lift towers and other properly marked or plainly visible objects and equipment. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 467.) Here, appellant was snowboarding on Mountain High's slopes. Appellant and her friends traversed over a double black diamond run in order to reach an intermediate run that was closed. After encountering icy conditions that were beyond their skill level, appellant and her friends sat in the snow. One of appellant's friends, Paulson, an advanced skier, was able to snowboard down the double black diamond-experts only run without incident. For some inexplicable reason, instead of traversing back to the runs that the group had skied for

hours earlier that morning, appellant took off her snowboard and slipped and fell down the double black diamond-experts only run. The icy condition of the slope was obvious to Ayres and her companions. If appellant believed that the terrain was too difficult for her to navigate, she could have chosen not to proceed. (See *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 13.)

Each morning before opening, the Mountain High ski patrol evaluated the conditions at the resort by skiing each run to determine what runs should be open or closed. Mountain High informs the skiing public that its runs are closed by placing hazard orange banners across the opening of a closed run. Shynn, one of the skiers in Ayres's group, noted that he saw an orange tape cutting across a sign that marked the beginning of the Route 66 run. If a skier or snowboarder were to encounter the closure of Route 66 and were at the top of Olympic Bowl run, they could avoid going down the double black diamond run by taking the bottom portion of Stampede to Goldrush.

Mountain High did not force appellant to take off her snowboard and approach the dangerous run. Nor was it obligated to close the run simply because intermediate skiers could not navigate the experts only run. (*Allan v. Snow Summit, Inc., supra,* 51 Cal.App.4th at p. 1367.) It is important to note that not only did an advanced skier within appellant's own group navigate the slope successfully, but so did two other individuals immediately prior to and after appellant's accident. Skiing and snowboarding are inherently dangerous sports, and ice is one of the many inherent conditions that a snowboarder can expect to encounter. (*Ibid*.) Indeed, "[t]he challenge and fun of the sport consists largely in the skier's skill in encountering such conditions." (*Ibid*.) If Mountain High was forced to close runs simply because an intermediate skier might choose to take off her snowboard while above an experts only run and then slip and fall while approaching the dangerous run, then the prospect of liability would be so high that they would have to close their business. (See *Kane v. National Ski Patrol System, Inc., supra,* 88 Cal.App.4th at p. 214.)

Here, the nature of the sport of skiing and snowboarding would be fundamentally altered if Mountain High was forced to close its double black diamond slopes and any slopes leading to the double black diamond slope, simply because an intermediate snowboarder could not navigate its terrain. Indeed, it is noteworthy that Paulsen witnessed a snowboarder and a skier successfully navigate the double black diamond slope both before and after Ayres's unfortunate accident. Although appellant is quick to state that she was not on the experts only run, but directly above it, and therefore should not be susceptible to a primary assumption of the risk, this position lacks merit. Indeed, the three individuals who were able to ski down Olympic Bowl must first have traversed the icy area above the run before entering it.

Appellant asserts that Mountain High owed her a duty to warn of the icy conditions and that respondent's failure to do so increased the inherent risks of the sport of snowboarding. Appellant further asserts that Mountain High should have closed the icy area above Olympic Bowl and warned patrons of the danger. Appellant then relies on testimony that Mountain High only posts its run closures on its phone lines or on its online website so that people will not know which runs are closed until they go on the slopes and find the closures for themselves, to prove that even if Mountain High had closed the run, it would have been negligent in failing to warn of the icy condition. This court is aware of no statutory duty requiring respondent to notify appellant of icy conditions, nor has appellant provided such authority. (See Annot., Ski Resort's Liability for Skier's Injuries Resulting from Condition of Ski Run or Slope (1987) 55 A.L.R.4th 632.)

Accordingly, the court correctly found appellant assumed the risk. Having decided that summary judgment was properly granted on the issue of primary assumption of the risk, we need not address the validity of the preprinted waiver on Mountain High's lift ticket.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

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WOODS, Acting P.J.

We concur:

ZELON, J.

JACKSON, J.